No. 14629

IN THE

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAMUEL M. DRIVER, *Judge*

APPELLANT'S BRIEF

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STATEMENT AS TO JURISDICTION

This action was commenced in the Superior Court of the State of Washington, for the County of Spokane, by plaintiff/appellee Clara Stintzi, as Guardian of Gerald Stintzi, a minor, against defendant/appellant, Northern Pacific Railway Company, on the 30th day of July, 1952, by service of summons and complaint (Tr. 3). By the action, Stintzi sought to recover for injuries received while crawling beneath the coupling of two freight cars on Northern Pacific trackage

and property, Stintzi at the time being in the course of employment for another concern, the Addison Miller Co. On August 29, 1952, Northern Pacific Railway Company filed a petition for removal with the United States District Court for the Eastern District of Washington, this being within the stipulated time for appearance (Tr. 3-6). On the same day a removal bond was filed with the District Court and notice of the filing of the petition for removal was served on appellee's counsel (Tr. 10-11).

The removal jurisdiction of the District Court was based upon the fact that at the time of the removal appellant was a corporation organized under the laws of the State of Wisconsin, and a citizen of that state, and appellee was a citizen and resident of Spokane County, Washington, in the Eastern District of the State of Washington (Tr. 5). The amount in controversy exceeded the jurisdictional amount, the action being for the recovery of $160,000 (Tr. 4). The removal jurisdiction of the District Court upon the foregoing facts was by virtue of Title 28, U. S. C. A. §1332, 1441 & 1446.

After removal, the case was tried by the District Judge, sitting with a jury, and resulted in a verdict in favor of plaintiff/appellee and against appellant, in the sum of $148,500, on which verdict judgment was entered on July 3, 1954 (Tr. 37-38). Thereafter on July 12, 1954 appellant interposed a motion for judgment notwithstanding the verdict, in accordance with Rule 50 of the Federal Rules of Civil Procedure, and a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure (Tr. 38-48).

These motions were both denied by order of the District Judge on October 12, 1954 (Tr. 49-50).

On November 5, 1954 appellant filed a notice of appeal with the District Court, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure, and the same day appellant filed the required appeal bond (Tr. 51-53). On November 26, 1954 the District Court by order extended the time for filing the record with this Court up to and including January 31, 1955 (Tr. 55). The record was docketed with this Court on January 20, 1955 (Tr. 915).

Upon the foregoing facts, this Court has jurisdiction of this appeal by virtue of Title 28, U. S. C. A. §1291 & 2107, and Rule 73 of the Federal Rules of Civil Procedure.

On November 10, 1954 appellant filed with the District Court a designation, pursuant to Rule 75 of the Federal Rules of Civil Procedure, calling for the inclusion of the complete record and all the proceedings and evidence in the action (Tr. 53-54).

STATEMENT OF THE CASE

Appellant's fundamental position on this appeal is that the District Judge should have directed a verdict for appellant because a total absence of any evidence tending to prove, directly or by inference, under the applicable decisions of the Supreme Court of the State of Washington, that the injured minor, Gerald Stintzi, was an invitee on the premises of appellant railway company, at the time and place of his in-

jury. It is our most vigorous contention that Gerald Stintzi was a trespasser, or at best a licensee, and that there was neither claim nor evidence of any breach by appellant of any duty owing to Stintzi as a licensee or trespasser. In the closing pages of this brief we will discuss certain other specifications of error directed to the rulings of the trial Court which we believe warrant the granting of a new trial in any event, but basically, we contend the action should be dismissed.

We will now endeavor to state the facts in the light of the evidence and inferences most favorable to appellee, with special attention to any evidence which might conceivably tend to prove any of the elements necessary to give Gerald Stintzi the status of an invitee at the time and place of his injury, under the law of the State of Washington.

As an appendix to this brief there is attached a map of the Northern Pacific Railway freight yard at Yardley, Washington (a suburb of Spokane), in which yard appellant Stintzi received his injuries. This map has been prepared for illustrative purposes only and is not to scale, but shows the pertinent portions of the freight yard substantially in accordance with the scale map which is in evidence as Exhibit 1. This freight yard consisted of 55 tracks and teemed with activity twenty-four hours a day. About 55,000 cars a month are handled, several movements of each car being required. Seven switch engines are constantly engaged in shunting cars within the yard (Tr. 525-528).

A red cross has been placed on the appended map to designate the approximate spot where Stintzi was injured while engaged in crawling beneath a coupling between freight cars standing on the Northern Pacific trackage. The entire property shown by the map was owned by appellant Northern Pacific Railway Company, but the ice house, tunnel and ice dock (icing platform) shown on the map were occupied and operated by a separate concern, Addison Miller Company, under a contract in existence between appellant and Addison Miller Company since the year 1936 (Ex. 42, Tr. 674-696).

The contract between appellant and Addison Miller Company is in evidence as Exhibit 42. By its terms, Addison Miller Company occupied, maintained and operated the ice plant, tunnel and icing platform (dock), employing its own personnel for the required work, which included the manufacture of ice, transporting ice as needed through the tunnel and onto the icing platform by means of a conveyor system, and icing and salting refrigerator cars from the elevated platform from which access was gained to the openings atop the refrigerator cars which were at times placed on Tracks 12 and 13 of the railroad yard (Tr. 65, 122-124). The tunnel also afforded a passageway between the ice plant and the dock for Addison Miller personnel. The contract provided that Addison Miller Company was to "prosecute the work under this contract according to its own manner and according to its own methods, and with and by its own means and employees, free from any supervision, inspection or control whatever by the rail-

way company, except only such inspection as may be necessary to enable the railway company to determine whether the work performed complies with the requirements of this contract, it being the intention of the parties hereto that the contractor shall be and remain an independent contractor and that nothing herein contained shall be construed as inconsistent with that status."

Attached to the contract is a blueprint outlining in red the ice plant, tunnel and icing platform as being the property as to which Addison Miller Company was given the right of occupancy (Tr. 694).

The contract further provided that Addison Miller Company was to operate the ice manufacturing plant at its own cost and expense; that it should, as and when directed by appellant, place ice in cars set at the car icing platform; that at its own cost and expense Addison Miller Company was to maintain the ice plant and make such replacements and renewals as might be necessary for the continued efficient operation of the plant; that appellant would furnish salt in cars and Addison Miller Company was to unload and store the same and then from time to time place it in the bunkers of refrigerator cars being iced. For its services as aforesaid, Addison Miller was to receive a rated compensation for the amount of ice and salt placed in appellant's cars.

As shown by the appended map, the icing platform, or ice dock as it is sometimes called, lies between Tracks 12 and 13 of the railway yard, Track 12 being to the south of the dock, and Track 13 to the north. The dock is 1260 feet long, extends east and west, and

is constructed so that ice is placed from the elevated platform into the tops of refrigerator cars on either Track 12 or 13 (Tr. 65, 122-124). When either of these tracks is not occupied by refrigerator cars being iced, such track is used by appellant railway company for general yard purposes, and Track 13 is customarily used for making up eastbound trains (Tr. 550, 555, 635). It is Track 13 that is here involved.

On July 17, 1952, and for about 5 days prior thereto, Gerald Stintzi was employed as a laborer by Addison Miller Company (Tr. 107). He had also been so employed for three weeks during the previous summer. During all of such employment prior to his injury, he had had no occasion to, nor had he set foot on, or crossed any of appellant's trackage (Tr. 173, 183-184, 235). He and other members of the crew of which he was a part were hired by Addison Miller Company, received their compensation from that company and took their orders from a Mr. Robert C. Fincher who was employed by Addison Miller Company as a foreman and had been so employed for 10 years (Tr. 106, 111-112, 705).

About 7:00 o'clock p. m. on July 17, 1952 Mr. Fincher, the Addison Miller foreman, instructed Stintzi and others of the Addison Miller crew to place in buckets some chipped or slush ice that had accumulated within the ice dock and to dump this ice north of Track 13 (Tr. 112-114, 131, 702). Thereupon Stintzi and Allen Maine, another member of the Addison Miller crew, carried the buckets of ice out while two other employees were performing the task of filling the buckets within the ice dock (Tr. 113-

114). When Stintzi and Maine took the first bucket out of the ice dock, they found that a string of coupled freight cars was standing on Track 13, and *they themselves decided* at that point, without consulting Foreman Fincher, that the easiest way to carry out his orders would be to go between the couplings of two of the standing cars (Tr. 131, 193, 214-216). They thereupon proceeded to do this, and Stintzi would first crawl beneath the coupling, following which, Maine would pass the bucket beneath the coupling to him and Stintzi would then dump the ice to the north of Track 13 and then pass the bucket back to Maine and return beneath the coupling (Tr. 127). Proceeding in this fashion, Stintzi had dumped the eighth or ninth bucket of ice and was between the freight cars passing the empty bucket back to Maine when the cars were suddenly set in motion and he was thrown beneath the wheels and sustained the injuries for which this action was commenced (Tr. 129-130).

The standing cars had been set in motion by another string of cars which had been disengaged from a switch engine some distance to the west and permitted to drift into and along Track 13 unattended. (Tr. 386-387). It was established beyond dispute by the evidence that there were blue lights on the north and south sides of the top of the icing dock and that it was the long-established practice between appellant railway company and Addison Miller Company, that these blue lights were to be turned on by Addison Miller Company at such time as its employees were engaged in working in or about cars on either Track

12 or Track 13 (Tr. 538, 765-766). The blue lights on the north side of the dock were to be turned on when Addison Miller employees were so engaged on Track 13, and the blue lights on the south side of the dock were to be turned on when such employees were in and about cars on Track 12 (Tr. 538, 765, Ex. 8). These blue lights were so arranged as to be visible both easterly and westerly from the dock (Tr. 538). The purpose of the blue lights was to warn Northern Pacific switching crews and yard personnel so no switching movement would be made on the track as to which the blue lights were turned on (Tr. 410. 538).

It was also established without dispute that, at the time the switching movement was made onto Track 13 causing Stintzi's injury these blue lights were *not* turned on, and that appellant's switching crew observed that the blue lights were not being exhibited on Track 13 before shunting the unattended cars onto that track (Tr. 395, 409, 703-704).

Stintzi, in defense of his action in going between the couplings of the standing cars, asserted that in the string of cars was a carload of salt which was at the time being unloaded into the ice dock, and he testified that he felt that was "insurance" that the cars would not be moved (Tr. 159-160). His claim that a salt car was being unloaded at the time was vigorously controverted by all of appellant's evidence and witnesses.

Stintzi and Maine further testified that they did not go around the cars, rather than through them, because there were quite a number of cars to the west

and their path would be more or less blocked to the east because of a platform which they claimed was between the alleged carload of salt and the ice dock (Tr. 132, 192-193, 214-216). It was established without controversy that there were areas on the south side of Track 13 where the buckets of ice could have been dumped, but Stintzi defended his action in crossing on the basis that he had been ordered to do so by the Addison Miller foreman (Ex. 37, Tr. 132, 216, 242).

Mr. Fincher, the Addison Miller foreman, testified that for a number of years it had been the practice of Addison Miller employees to cast empty salt sacks and other debris to the north of Track 13, between Track 13 and Track 14 (Tr. 714-715, 744-745). He testified that on only two or three occasions prior to the time in question, during his ten years as foreman had he removed any slush ice from the ice dock and that on those occasions the slush ice had been dumped in the same area north of Track 13 (Tr. 705-706).

Employees of Northern Pacific Railway Company conceded that the area between Track 13 and 14 of the Northern Pacific yard was "a common dumping ground" because Track 14 was what was known as a "cleanout" track (Tr. 547, 554, 788-790, 811). To carry out its function in this respect, the north rail of Track 14 was elevated slightly above the south rail so that cars placed thereon would lean to the south and cars were taken to this track to be cleaned out for further service, debris from within the cars being dumped south of track 14, which would be between Tracks 13 and 14 (Tr. 554). No employee of Northern Pacific

Railway Company, in a position of authority or otherwise, ever testified as to any knowledge that Addison Miller Company was using this area for a dumping ground. Of the Northern Pacific employees who testified, all categorically denied having ever seen any Addison Miller employee crossing Track 13 or having any knowledge that any Addison Miller employees ever did so for any purpose (Tr. 548, 588, 768-769). Furthermore, the record is absolutely barren of any evidence from any source from which it could be inferentially concluded that appellant railway company knew of any practice on the part of Addison Miller employees to cross Track 13 for any purpose and most certainly was there no evidence of permission by appellant that such might be done.

It appeared that the slush ice being carried out by Stintzi and the other Addison Miller employees was an accumulation caused by a tendency of the large cakes of ice to be chipped as they passed around a bend in the conveyor system (Tr. 273). There was a pit below this point where the broken ice fell and in the pit was a drain (Ex. 5).

It appeared from the evidence that the work regularly performed by Addison Miller Company and its employees in and about the ice dock consisted of (1) icing the bunkers of refrigerator cars and placing salt with the ice, which work was performed from the top of the icing platform and over onto the top of the refrigerator cars, and (2) unloading salt into a portion of the ice dock called "the salt house," which work was performed at such time as a freight car loaded with salt had been spotted on Track 13

opposite the salt house, by placing a platform between the floor of the freight car and an elevated opening in the salt house, and carrying the sacks of salt from the freight car into the salt house by means of this platform (Tr. 106, 186, 232). None of this work had ever required the presence of Addison Miller employees on any of appellant's trackage (Tr. 184, 234-235).

When cars were being iced from the top of the icing dock, it was the practice of appellant company to have one of its employees present atop the dock for the purpose of directing the amount of ice and salt to be placed in each car, the requirements of various cars being different in this respect (Tr. 589-590, 661). Also, this Northern Pacific employee, called an ice helper, recorded the amount of ice and salt placed in the cars for the purpose of computing the payments due Addison Miller Company under the contract (Tr. 535, 539).

Appellant, at the close of the plaintiff's case and at the close of all of the evidence, moved for a directed verdict upon the ground that there was no evidence which could form the basis of a finding that Gerald Stintzi was an invitee at the time and place of his injury and that there was no evidence which could warrant a recovery by him as a licensee or trespasser and also on the grounds that appellant was not negligent and that Stintzi was contributorily negligent as a matter of law (Tr. 485-504, 857-858). The District Judge denied both of these motions and submitted to the jury as a question of fact the issue of whether Stintzi was an invitee, correctly informing the jury

that if he was not an invitee he could not recover (Tr. 504-508, 858, 878-880).

SPECIFICATIONS OF ERROR

I.

The District Court erred in denying appellant's motion for a directed verdict at the close of appellee's case.

II.

The District Court erred in denying appellant's motion for a directed verdict at the close of all of the evidence.

III.

The District Court erred in denying appellant's motion for judgment notwithstanding the verdict made pursuant to Rule 50 of the Federal Rules of Civil Procedure.

IV.

The District Court erred in permitting over appellant's objection, the examination by appellee of the witnesses Lavern W. Prophet and James Crump concerning their knowledge of Rule 805 of the Consolidated Code of Operating Rules and General Instructions, which code controlled the conduct of appellant's employees while engaged in railway operations, and further erred in admitting in evidence as Exhibit 47, over appellant's objection, a written excerpt from said Rule 805, reading as follows:

"Before moving cars or engines in a street or on station or yard tracks, it must be known that they can be moved with safety.

"Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided." (Tr. 800-801).

The witness Prophet was asked whether he had the foregoing rule in mind when he switched the string of cars onto Track 13 which drifted against the standing cars between which Stintzi was passing (Tr. 419-422), and the witness Crump was asked substantially the same questions (Tr. 799-800). In each case the questions were objected to as incompetent, irrelevant and immaterial, for the reason that the said rule was not within the issues of the case and because there was no allegation of a rule violation in the pleadings or statement of issues (Tr. 419, 799).

Following the interrogation of these witnesses concerning the above-quoted portion of Rule 805, a typewritten copy of the quoted portion of the rule was offered in evidence by appellee, and the same objection as previously stated was interposed, but the document, Exhibit 47, was admitted by the Court (Tr. 800-801).

V.

The District Court erred in giving the following instruction to the jury:

"There is also in evidence Rule 805 of the Consolidated Code of Operating Rules, which reads in part as follows:

" 'Before moving cars or engines in a street or on a station or yard track, it must be known that they can be moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone.'

"In this connection, I instruct you that the defendant, Northern Pacific Railway Company, was required to exercise due care in the movement of it's cars, notwithstanding the fact that it had this arrangement which I have described with Addison Miller Company with reference to the blue light and that no blue light was shown or burning on the icing dock at the time of the accident. If defendant Northern Pacific Railway Company had any reason to anticipate that persons might lawfully be employed in, on, under or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them." (Tr. 885-886.)

Objection was duly taken to this instruction before the jury retired, upon the grounds that Rule 805 had been improperly admitted in evidence, that it was not within the issues, and that it was not a rule enacted for the benefit of Gerald Stintzi and particularly for his benefit when he was doing what he was doing at the time, that is, crawling beneath the cars (Tr. 898).

VI.

The District Court erred in giving the jury the following instruction:

"If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if

you further find that the defendant Northern Pacific Railway Company was also guilty of *negligence in any degree* or act or failure to act, as charged and claimed by the plaintiff, *which contributed proximately in any measure* to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto." (Tr. 886-887.)

Objection was duly urged to this mandatory instruction before the jury retired, upon the grounds that the words, "negligence in any degree" permitted a recovery by plaintiff upon a finding of slight negligence, and for the further reason that the language "which contributed proximately in any measure" permitted a recovery for negligence which was less than a material cause (Tr. 905-907).

VII.

The District Court erred in refusing to give that portion of appellant's requested instruction No. 3, reading as follows:

> "You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties fur-

nishes no excuse for knowingly going into a position of danger." (Tr. 35).

Objection was duly urged to the failure to give this instruction before the jury retired upon the ground that it was appellant's evidence and theory of the case that Stintzi could have walked to the east a distance of about 120 feet and crossed over the tracks without the necessity of crawling under cars, and that he could have also dumped the ice in areas adjacent to the ice dock without the necessity of crossing the track at all (Tr. 899-901).

VIII.

The District Court erred in refusing to give appellant's requested instruction No. 6, reading as follows:

> "Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing Track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant." (Tr. 36-37.)

Objection was duly urged to the failure to give this requested instruction before the jury retired, upon the grounds that the only evidence in the record that could possibly excuse Stintzi from being contributorily negligent as a matter of law was his contention that a salt car was being unloaded into the ice dock at the time, which claim on his part was vigorously controverted by appellant's evidence, and that appellant was entitled to have such an instruction on that

point inasmuch as that was the real issue in the case insofar as the contributory negligence of Stintzi was concerned (Tr. 901-903).

IX.

The District Court erred in denying appellant's motion for a new trial upon the basis that the verdict was excessive.

SUMMARY OF ARGUMENT

1. Appellee Stintzi as a matter of law was not an invitee at the place of the injury and so cannot recover. There is no evidence upon which to base a finding that he was either expressly or impliedly permitted by appellant to cross Track 13, and particularly no evidence which could possibly warrant a finding that he had permission to cross Track 13 by crawling beneath the couplers of standing freight cars to do so. Appellant had no interest in Stintzi's errand of carrying out slush ice which occasioned his presence on Track 13, and his errand was of no benefit or concern to appellant, and therefore, even if he had implied permission to cross Track 13, he was only a licensee and cannot recover.

2. Appellee Stintzi was guilty of contributory negligence as a matter of law. Notwithstanding his much disputed claim that a salt car was being unloaded from the string of cars on Track 13 and that this was insurance that the cars would not be moved, such was not a reasonable basis for an assumption on his part that he was safe in so doing, and notwith-

standing such claim, reasonable minds cannot differ on the subject of the extremely hazardous and foolhardy nature of *his own decision* to cross between these cars in a freight yard consisting of 55 tracks teeming with activity.

3. Appellant was not guilty of any negligence which was a proximate cause of the accident. The long-standing practice between Addison Miller Company and appellant required Addison Miller Company to turn on the blue lights on the dock adjacent to Track 13 when its employees were so working as to be endangered by any movement on that track, and the undisputed evidence discloses that the blue lights were not so turned on. Appellant and its employees had a perfect right to rely on that practice and to believe that cars could be switched onto Track 13 with safety in the absence of the blue light, and under these circumstances the sole proximate and efficient cause of Stintzi's injuries was the failure of Addison Miller Company and its foreman to turn on the blue lights.

4. Aside from the foregoing, the District Court fell into error, justifying and requiring a new trial, in the particulars hereafter discussed and, in any event, the verdict is so excessive that it should be reduced.

ARGUMENT

A. Specifications of Error I, II & III.

These specifications involve our basic contention that Gerald Stintzi as a matter of law was not an invitee and so cannot recover. This being a diversity of citizenship case, the Federal Courts, under the rule of *Erie R. R. Co. vs. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, are governed by the case law of Washington, where the cause of action arose. We will therefore deal chiefly with the decisions of the Supreme Court of Washington, since in some respects as to the questions here involved, that Court is not in accord with other jurisdictions.

In Washington it has been repeatedly and uniformly announced that the only duty that the owner or occupier of a premises owes to a licensee or trespasser thereon, is to refrain from wilfully or wantonly injuring him.

The most recent pronouncement of this rule is in *Dotson vs. Haddock,* 146 Wash. Dec. (Adv. Sheets) No. 1, p. 47, 278 Pac. (2d) 338. In that case, not yet incorporated in the bound volumes, the Court said:

> "It has been repeatedly held by this Court that, as to a licensee, the owner or occupant of land owes only the duty of not wilfully or wantonly injuring him. (Citing cases.) * * * Appellants make reference to several decisions from other jurisdictions. In general, these decisions seem to sanction the form of concealed danger rule suggested in the *Christiansen* case and in the Restatement. Insofar as such decisions tend to support a less rigid rule, they are definitely out of harmony with the established law of this state.

We are not disposed to sanction such a departure from our present rule."

See also:

McNamara vs. Hall, 38 Wash. (2d) 864, 233 Pac. (2d) 852;

Deffland vs. Spokane Cement Co., 26 Wash. (2d) 891, 176 Pac. (2d) 311;

Garner vs. Pacific Coast Coal Co., 3 Wash. (2d) 143, 100 Pac. (2d) 32.

It will thus be seen at the outset that in Washington a much more restricted duty is owed to licensees and trespassers than obtains in many other jurisdictions. The Supreme Court of Washington has been unwilling to recognize or adopt various exceptions and liberalizations of the foregoing rule which have grown up elsewhere.

The Court in several decisions has defined wantonness as an act in reckless disregard of the safety of the injured person, after discovering his peril.

Price vs. Gabel, 162 Wash. 275, 298 Pac. 444;

Garner vs. Pacific Coast Coal Co., 3 Wash. (2d) 143, 100 Pac. (2d) 32.

In this case, there was neither pleading nor proof of a wanton or wilful injury to Stintzi. The District Judge recognized this and instructed the jury that they must find that Stintzi was an invitee or he could not recover (Tr. 879-880). It is thus apparent that if it can be said, as a matter of law, that Stintzi was not an invitee at the time and place of his injury, the judgment must be reversed and the action dismissed.

Two elements are essential to give one the preferred status of an invitee on the premises of an-

other; (1) he must be on the premises of the other with the permission or consent of the other, express or implied, and (2) he must enter the premises for a purpose connected with the business in which the owner or occupant of the premises is engaged, and there must be some mutuality of interest between him and the owner as to the purpose of his visit. Thus, in *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797, an en banc decision to which we will later refer in more detail, the Court said:

> "An invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged, or which he permits to be conducted thereon; and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates. * * * In this connection, it is also the rule that liability upon an implied invitation is limited by the extent of the invitation and does not extend to injuries received on a portion of the owner's premises not covered by the invitation."

And in *Kinsman vs. Barton & Co.,* 141 Wash. 311, 251 Pac. 563, it is said:

> "Permission and community of interest are necessary. But permission is the only element making up the relationship of a licensee, and without it a person would become a trespasser."

It is apparent and consonant with the foregoing authority that if the first element is lacking, that is, that the injured person is on the premises of the other without permission or consent, express or implied, he is a trespasser even though the second ele-

ment of mutuality of interest is present. Thus, if I see that my neighbor's lawn needs cutting and, in a spirit of helpfulness, but without any permissive basis, undertake to cut it, I am a trespasser, notwithstanding that I am wholly serving his interests in what I am doing.

If the first element of express or implied permission or consent is present, but the second element of mutuality of interest is absent, then the injured person is but a licensee. It is only when both the first and second elements are present that the injured person is an invitee.

In this case, Stintzi, without question, was an invitee while he was in the ice dock, or on the platform, or in the tunnel, or in the ice house, or while he was unloading salt from the interior of a box car and across the elevated ramp into the salt room, or while he was working between the elevated platform and the tops of refrigerator cars in icing operations. He was clearly so invited by appellant by virtue of the contract between it and Addison Miller Co.; but it is our position that such were the limits of his invitation and that he ceased to be an invitee when doing anything else or going to any other portion of the railway company's premises. In crossing Track 13, and in particular, in doing so in a highly dangerous manner most assuredly not countenanced or intended by appellant, Stintzi had neither express nor implied permission, nor did appellant have any interest in what he was doing. In other words, we contend that neither of the two foregoing elements of permission and mutuality of interest were present,

and in any event both elements assuredly were not present.

We now propose to discuss each of the foregoing two elements as applied to this case, having in mind what our Supreme Court elsewhere said in the case of *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797.

> "Since the respondent could be held liable, if at all, only upon the theory that the deceased was an invitee at the particular time and place of the alleged injury resulting in his death, *the burden rested on the appellant* to prove that, as to the respondent, the deceased then and there occupied the legal relationship of an invitee."

(1) No Permission, Express or Implied.

There is absolutely no evidence in the record of any express permission given by appellant to Addison Miller Co. or any of its employees to cross Track 13 for the purpose of dumping debris or slush ice, or for any other purpose. We are certain that appellee will make no contention to the contrary; therefore it is only necessary to consider whether appellant impliedly permitted such to be done. There seems to be no Washington decision specifically defining implied permission, but the general rule is well established. In 38 Am. Jur. 758, Negligence, §98, it is said:

> "An invitation to enter may be implied from conduct of the owner or occupant, or of someone else with his permission, which he knows, or reasonably should know, might give rise to the belief in a mind of a person ordinarily discerning, that the owner or occupant intended such person to come upon the premises. * * * As a general principle, the fact that the premises are main-

> tained in such a condition as to be attractive, even to the point of tempting entry thereon, does not constitute an allurement or inducement which is the equivalent of an invitation to enter * * *."

In Restatement of the Law of Torts, Volume 2, §330 (Comment d.), it is said:

> "The consent which is necessary to confer a license to enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation which a reasonable man would put upon the possessor's acts."

In Black's Law Dictionary (4th Ed.), it is said:

> "An invitation may be *express* when the owner or occupant of the land by words invites another to come upon it or make use of it or of something thereon; or it may be *implied* when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used. (Citing many cases)."

What acts or conduct were there on the part of appellant or its agents tending to indicate that appellant permitted and intended that the area between Tracks 13 and 14 was to be used by Addison Miller Company as a dumping ground? There was no evidence whatsoever of any such acts or conduct, and we are confident that appellee will be unable to show otherwise by reference to the record.

It is not disputed that Track 14 was a cleanout track and that appellant used the area south of Track 14, lying between Tracks 13 and 14, as a dumping

ground. There was also evidence by the testimony of Mr. Fincher, foreman for Addison Miller Co., that Addison Miller Company employees had made it a practice for a considerable period to cast empty salt sacks into that area, although it does not appear whether they were thrown across Track 13 or carried across (Tr. 714-715). There was also testimony by Foreman Fincher that on two or three previous occasions he had caused slush ice to be dumped to the north of Track 13 (Tr. 705-706).

However, there was no evidence by any Addison Miller employee, or by any Northern Pacific employee or from any other source, that appellant railway company ever knew of or consented to the foregoing practices of Addison Miller Company, and there was most certainly no evidence that anyone from Addison Miller Company had ever before crawled beneath or between standing cars or that appellant had ever countenanced such a practice. On the contrary, there is affirmative evidence from various Northern Pacific employees, including the yardmaster, assistant yardmaster and the foreman of the switching crew that they had never observed, in the area between Tracks 13 and 14, any salt sacks or slush ice, and that they had no knowledge whatsoever that Addison Miller and its employees were using this area as a dumping ground (Tr. 425, 538, 547-548, 588, 661; 768-769, 788-790).

It seems self-evident that the acts and conduct which can give rise to an implied permission must be acts and conduct directed toward the one asserting the permission. Here, we have a dumping ground maintained on appellant's premises. That fact, without more, surely cannot confer a permission on others to dump there, no matter how close to the dumping group they may be situated or engaged. The further fact that, notwithstanding, such persons have used the dumping ground without any knowledge or consent of the owner, cannot change the situation.

That the invitation to Addison Miller employees extended only to the limits of the icing dock or platform and did not extend onto Track 13 or across that track to the dumping area is best illustrated by the case of *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797. The facts in that case are strikingly similar. There, Weyerhaeuser Timber Co. owned and operated a mill at Everett, Washington and a wharf or pier adjacent thereto, at which vessels would moor for the purpose of taking aboard the company's lumber products. The plaintiff Christiansen was a member of a crew of a vessel which moored at the wharf and was in the process of taking aboard a cargo of the defendant's lumber products. On the opposite side of the wharf from which the vessel was moored was an electrical outlet, and it was the long-standing practice of the crew of this vessel, which regularly called at the wharf, and also the long-standing practice of the crews of other vessels, to stretch a cable from the vessel across the wharf and plug it into this outlet for the purpose of oper-

ating the electric lights on the vessel during the hours of darkness, during which time loading operations were not in progress. Christiansen was electrocuted while at the electrical outlet for the purpose of unplugging the cable one morning. The Court there held that Christiansen was an invitee while on the wharf in the area required by the loading operations, but that he ceased to be an invitee when he went to the opposite side of the wharf to remove the cable from the electrical outlet. In that case, it appeared that the timber company had permitted the practice of vessels using the electrical outlet to supply current during the night, and to that extent that decision differs from the facts here. The Court held, however, that such permission only created a license, not an invitation, since Christiansen was at a portion of the premises not covered by the invitation of the timber company and was there for a purpose in which the timber company had no interest.

We fail to see how Stintzi and the other personnel of Addison Miller Company, by virtue of the contract or the dealings otherwise with appellant, had any permission or invitation to go upon the premises of Northern Pacific Railway Company beyond the immediate confines of the ice dock, tunnel and ice house, except for the purpose of unloading salt from box cars as heretofore described. If Stintzi had been inside a box car on Track 13 which contained salt or was traversing the ramp between such a box car and the icing dock, or had been placing the ramp between the box car and the icing dock, he would clearly have been an invitee. Or if he had been atop a refrigerator

car while placing ice in the bunkers, he would likewise have been an invitee, but when he was elsewhere on appellant's premises, beyond the confines of the ice dock, tunnnel and ice house, we say that he was beyond the limits of his invitation and without any permission, express or implied, and was not an invitee nor licensee, but, in fact, a trespasser. The fact that he was directed to do what he did by the Addison Miller foreman cannot alter the matter or change his status as respects appellant. Somewhere was a line defining the limits of his permission, and we say that line was south of Track 13.

Furthermore, if it could be said that Stintzi and other Addison Miller employees had implied permission to cross Track 13, could it possibly be said that they had permission to do so by the most dangerous expedient of crawling beneath the coupling between standing freight cars? In *Hansen vs. Lehigh Valley Railway Co.* (3rd C.A.), 120 Fed. (2d) 498, the Court quoted with approval from Cooley on Torts (4th Ed.), as follows:

> "A person is only an invitee as long as he keeps within the limit of the invitation. * * * The invitation may be limited as to space, time, and method of user of the premises. * * * The invitee must use the premises in the manner contemplated by the terms, express or implied, of the invitation. If he uses them in a different manner he loses the protection to which he is entitled as an invitee. In the words of Lord Atkin, 'This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purpose for which he has been invited. He is not invited to use any part of the premises for purposes which

> he knows are wrongfully dangerous and constitute an improper use.' As Scrutton, L.J. has pointedly said, *'When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters.'* " (Italics ours.)

If permission to cross Track 13 is to be implied, there is most assuredly no evidence that appellant railway company by any acts or conduct ever evinced permission or consent that Addison Miller employees could do so by passing between and beneath the couplings of standing cars. It is of course inconceivable that the railway company would have ever given such permission and no reasonable person could justifiably infer such permission from anything short of express consent. As is said in 44 Am. Jur. 653, Railroads, §431,

> "In any case, it is said that only express consent will serve to license a thoroughfare across a train."

Stintzi and his fellow employees did not have express consent to cross Track 13, there were no acts and conduct shown on the part of appellant from which implied consent or permission might be inferred, and most certainly there could be no implication of permission to cross the track in the hazardous fashion which he followed. We therefore submit that this Court should rule as a matter of law that he was a trespasser at the time and place of his injury and in consequence cannot recover.

(2) No Mutuality of Interest.

Assuming, for the purposes of argument, that there was some basis in the evidence for a finding that ap-

pellant had impliedly permitted Addison Miller employees to enter upon and cross Track 13 by crawling beneath cars, still Stintzi was only a licensee in so doing unless appellant railway company had some interest in the errand which he was at the time performing. This is the second element of mutuality of interest, heretofore referred to, necessary to give Stintzi the status of an invitee at the time and place of his injury.

As to this element, the case at bar is indistinguishable from *Christiansen vs. Weyerhaeuser Timber Co.*, 16 Wash. (2d) 424, 133 Pac. (2d) 797, the facts of which have been previously detailed. There, permission existed for Christiansen, a member of the crew of the vessel, to go to the opposite side of the wharf in connection with the practice of using the electrical outlet to supply current to the vessel during the night. The Court said,

> "Most important of all is the fact that the evidence fails absolutely to disclose any mutuality of interest between respondent on the one hand and the ship owners and their employees on the other, in the alleged errand of the deceased at the time immediately preceding his death. There is no showing of any agreement or understanding between the respondent and the owners of the ship whereby the respondent obligated itself to furnish electricity to the vessel after it had shut down its generators. There is no showing of any benefit to the respondent in having lights on the ship after loading operations for the day had ceased. It was of no concern to the respondent how the ship, when idle, maintained its lights, whether by its own generators continuing to function as in the daytime, or whether by kerosene lamps after the generators had shut down. In

fact, it did not matter to the respondent whether the ship then had lights at all. The savings of fuel by the vessel in shutting down its engines in no way affected the respondent.

"It is true that the ship, through the members of its crew, made use of respondent's facilities by plugging a cable into the Benjamin fitting on the farther side of the wharf, but so far as the record discloses that was at most simply by permission of the respondent. In any event, the practice employed was solely for the benefit of the ship and its crew and had nothing to do with any operation in which the respondent was concerned. Permission without mutuality of interest, however, simply constitutes a license, not an invitation; nor does long-continued use by permission convert a licensee into an invitee, for, as stated by Judge Pound, in *Vaughan v. Transit Development Co.,* 222 N. Y. 79, 118 N.E. 219, 'the law does not so penalize good nature or indifference nor does permission ripen into right.' "

Here, there was no showing of any interest that appellant had in the disposal by Addison Miller Co. of chipped or slush ice which might accumulate beneath the conveyor inside of the premises let by appellant to Addison Miller Co. By the express terms of the contract, appellant's only interest as to the premises occupied by Addison Miller Co. was the icing of refrigerator cars and the unloading and storing of salt within the dock to be used in connection with such icing operations. The manner in which ice was manufactured, conveyed through the tunnel and onto the top of the ice dock, was wholly left to the discretion and control of Addison Miller Co. So also was the matter of cleaning up the premises, the contract providing that Addison Miller Co. should "maintain" the premises (Tr. 687).

As to what has just been said, the case of *Hansen vs. Lehigh Valley Railway Co.* (3rd C.A.), 120 Fed. (2d) 498, is most pertinent in point of fact. There, the plaintiff was the superintendent of a wrecking contractor who was engaged in tearing down buildings adjacent to certain of defendant's trackage. The defendant railway company furnished gondola cars for the contractor to load with metal scrap from the wrecking operations. The plaintiff was injured because the defendant's cars had been carelessly spotted on its trackage without being adequately braked or chocked. The contractor was using a crane to load the scrap onto the gondola cars, with plaintiff directing the operation. He observed that the crane cable was coming in contact with the edge of the defendant's gondola car and, desiring to avoid damage to the cable, he was placing a piece of lumber between the cable and the car. While so engaged, the car rolled forward, causing his injury. The Court said:

> "We think these facts bring the case within the 'outside of purpose' or 'excess of limitation' rule as a matter of law. The invitation to the wrecking contractor's employees went no further than the loading of defendant's freight cars. The method by which the material to be loaded was procured was none of its concern. So the defendant-railroad company was not interested in the particular arrangement of wall, cable and crane. *A fortiori* it was not interested in the protection of the cable. In acting to preserve it from friction, plaintiff was serving his own employer's purpose and not coming within any use sanctioned by the railroad company. * * * The learned trial judge was therefore in error in leaving the question of invitation to the jury."

It was a matter of no importance to appellant how Addison Miller Co. disposed of the debris incident to its operations, including empty salt sacks, slush ice and the like. There was no showing of any circumstances which compelled Addison Miller Company to dispose of such debris across Track 13. There was nothing to prevent the slush ice from being melted down so that it would pass out the drain at the bottom of the pit where it accumulated, nor anything to prevent the slush ice, empty salt sacks and other debris from being transported back through the tunnel to be disposed of in some safe place beyond the railroad yard proper. Furthermore, the exhibits show that there was a large open area to the west where the ice could have been dumped without the necessity of crossing any tracks (Ex. 1, 15, 43).

There was no claim that at the time in question the slush ice had accumulated below the conveyor to such an extent as to impede icing operations in any way. Nor were there any refrigerator cars waiting to be iced, nor any expected in the immediate future (Ex. 38, Tr. 581-582). Appellant had no more interest in the dumping of this slush ice than it had in the disposal by Addison Miller Company of other miscellaneous debris which might from time to time be swept from the floors of the ice dock, tunnel or ice house.

The Supreme Court of Washington has made it clear that the mutuality of interest necessary to create the relationship of invitee requires a material or pecuniary benefit to the owner of the premises and that an incidental or immaterial benefit is insufficient. In

Dotson vs. Haddock, 146 Wash. Dec. (Adv. Sheets) No. 1, p. 47, 278 Pac. (2d) 338, the Court said:

> "We are of the opinion that, before a person may attain the status of an invitee, it must be shown that the business or purpose for which the visitor comes upon the premises, is of material or pecuniary benefit, actual, or potential, to the owner or occupier of the premises. This requirement has been given implicit recognition by this Court in prior cases. (See *Kinsman v. Barton & Co.,* 141 Wash. 311, 251 Pac. 563; *Christiansen v. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797. Appellants argue that, since the meeting was held at respondents' home, for their convenience and benefit to save them the expense of hiring a baby sitter, appellant wife met all the qualifications of an invitee on this occasion. We must agree with respondent that such incidental benefit will not be sufficient to characterize the visitor as an invitee."

During the trial neither counsel for appellee nor the District Judge gave indication of their position as to what interest appellant had in Stintzi's errand at the time in question. In consequence, we are unable to anticipate what arguments may be advanced in this connection. It may be contended that it was in appellant's interest that the slush ice be removed so that the icing of appellant's refrigerator cars would not be interrupted or delayed. Such an argument would be without evidentiary basis and invalid on the authority of *Kinsman vs. Barton & Co.,* 141 Wash. 311, 251 Pac. 563. In that case, the plaintiff was employed in a restaurant. The restaurant occupied a room in defendant's meat packing plant. Plaintiff's employer, the owner of the restaurant, had been permitted to use defendant's room without charge

or rent. The Court held that the plaintiff under the circumstances was but a licensee because mutuality of interest was lacking, and said,

> "The appellant (plaintiff) contends that this interest is shown by the fact that respondent let her employer have the use of the restaurant without charge or rent; that this fact shows that respondent wanted a nearby place where its employees could obtain their noon meals. But the deduction which appellant draws is nothing more than a possible one. It could be argued with as much plausibility that appellant's employer was not charged any rental because respondent did not consider the room to be of any value to it, or because it desired to be of some assistance to appellant's employer. There is an entire lack of affirmative testimony that respondent wanted the restaurant on its premises for its benefit. The mere fact that respondent did not make a charge for the use of the room is too slender a thread upon which to hang a mutuality of interest."

Here, any claim that appellant railway company had any interest in the disposal of slush ice across Track 13 would likewise have to be based purely on speculation and conjecture. There is no affirmative showing that it had any such interest. There being no mutuality of interest, we submit that at best Stintzi was but a licensee at the place of his injury and, irrespective of any implied permission to be there, cannot recover.

In further support of Specifications of Error I, II and III, we contend that Stintzi, no matter what his legal status might have been, was guilty of contributory negligence as a matter of law. Notwithstanding his much disputed testimony that a salt car was among

the string of freight cars on Track 13 and was being unloaded at the time, and that he felt this was "insurance" that the cars would not be moved, it is difficult to see how reasonable minds could differ on the subject of the extremely hazardous and foolhardy nature of *his own decision* to cross between these cars in a freight yard consisting of 55 tracks teeming with activity.

Stintzi was 17 years old at the time and should be charged with mature judgment. He was a bright, alert young man who had worked for four years on construction projects, in mines, and in driving trucks (Tr. 156). This Court can take judicial notice of the type of activity and the constant danger within a large railroad freight yard.

Exhaustive research on our part has failed to disclose any case where anyone engaged in passing between standing coupled railroad cars has ever been permitted by an appellate court to recover, while on the other hand, there are countless cases where persons injured while so engaged have been held contributorily negligent as a matter of law.

Southern Ry. vs. Thomas (Ky.), 92 S.W. 578;

Koke's Adm. vs. Andrews Steel Co. (Ky.), 149 S.W. 968;

Brackett Adm. vs. L. & N. Ry. (Ky.), 111 S.W. 710;

Central Railroad vs. Ryles (Ga.), 13 S.E. 584;

Lambrakis vs. Chicago etc. Ry. (Iowa), 199 N.W. 994;

Gulf Ry. Co. vs. Dees (Okla.), 143 Pac. 852;

L. & N. Ry. vs. White (Ky.), 297 S.W. 808;

Cato vs. St. Louis S. F. Ry. (Ark.), 79 S.W. (2d) 62;

St. Louis S. F. Ry vs. Shepherd (Ark.), 109 S.W. (2d) 109.

Also in support of Specifications of Error I, II & III, we contend that appellant railroad was not guilty of negligence in the premises as a matter of law, no matter what Stinzi's legal status may have been at the time. The undisputed evidence was that in accordance with long-standing practice, there were blue lights provided at the icing dock which were to be turned on when Addison Miller employees were in and about standing cars on Track 13, for the purpose of warning Northern Pacific employees and freezing the track so that no switching movements would be made on Track 13 which might endanger such Addison Miller employees (Tr. 410, 538, 765-766). Likewise undisputed is the evidence that these blue lights were *not* being displayed and were *not* turned on at the time in question, and that if they had been turned on, the switching crew would have seen them and would not have made the switching movement which caused Stintzi's injury (Tr. 395, 409, 703-704).

It is our position that with this practice as to the blue lights, appellant and its employees had a right to rely on such practice and had a right to believe that the cars could be moved safely onto Track 13 in the absence of the blue light and that the sole proximate cause of Stintzi's injuries was the failure of the Addison Miller Company foreman, Mr. Finch-

er, to turn on the blue lights upon instructing Stintzi and the other employees to carry the ice across Track 13.

We most earnestly believe that this judgment should be reversed and the action ordered dismissed because appellee Stintzi as a matter of law was not an invitee, and in any event, because he was guilty of contributory negligence as a matter of law, and because appellant was not guilty of any negligence which was a proximate cause of the accident.

B. Specifications of Error IV & V.

These specifications have to do with our claim that the District Court erred in permitting cross-examination of appellant's witnesses as to whether they had in mind at the time in question Rule 805 of the railroad operating rules, and the Court's further error in admitting a written excerpt from said rule in evidence as Exhibit 47, and our further claim that the Court erred in instructing the jury as to said portion of Rule 805.

The amended complaint contained no allegation which either directly or indirectly charged the appellant with negligence in the violation of any operating rule (Tr. 12). Appellee's statement of contentions following a pre-trial conference contained no allegation charging the defendant with the violation of any operating rule (Tr. 25). The injection of a rule violation into the trial of this case came about in the following manner: Laverne W. Prophet, the foreman

of the Northern Pacific switching crew, was called as a witness on behalf of the appellee. On his direct examination he was in no wise interrogated with reference to Rule 805 or any portion thereof (Tr. 377-408). On cross-examination by appellant's counsel, the witness was not interrogated in any wise with reference to Rule 805; he was only asked as to the presence or absence of a blue light on the Addison Miller dock when the switching took place. This subject of blue lights had already been opened up on Prophet's direct examination by appellee's counsel (Tr. 395, 403). It has already been pointed out that it was the duty of Addison Miller Company to display a blue light on top of the ice dock when any of its employees were engaged in icing operations, which would serve as a warning to the switching crews of the appellant that no switching was to be done on Track 13. It is conceded that there was no such light on the evening Gerald Stintzi was injured. On redirect examination by appellee's counsel he was interrogated as follows:

> "Q. Then you talk about the blue light, Mr. Prophet. Is that some rule adopted by the railroad? A. That was in the book of rules when I hired out. Q. And that is the one rule you had in mind when you turned these 14 cars loose the night of July 17th, the blue light rule? A. I don't quite understand you, sir. Q. Did you have in mind any other railroad rule when you turned those cars loose that night? MR. McKEVITT: Objected to as incompetent, irrelevant and immaterial. There is no allegation of a rule violation in the pleadings or statement of issues. * * * THE COURT: I will overrule the objection. * * * A. Yes, sir. Q. You did? A. Yes, sir. Q. Did you have in mind at that time Rule 805 of the Consolidated Code, reading as follows . . . MR.

McKEVITT: Your Honor, I am going to object to this, of going into this Consolidated Code of Operating Rules. There is nothing in the pleadings here to indicate in any manner that this man was injured by virtue of the violation of a rule enacted for his protection. MR. ETTER: Failure to warn is alleged in three separate allegations in different fashion. THE COURT: Well, does this rule have to do with warning? MR. ETTER: Certainly it has to do with warning. MR. CASHATT: Your Honor, but the employee here was an Addison Miller employee. MR. ETTER: Yes, but this rule has to do with warning anyone. Anyone. MR. MacGILLIVRAY: Let's read the rule and then make the objection. MR. McKEVITT: Well, if you read the rule, why then - - MR. MacGILLIVRAY: May I hand the rule to your Honor? THE COURT: Yes. MR. McKEVITT: Let the Court read the rule. MR. MacGILLIVRAY: 805, marked there in pencil, your Honor. (Document handed to Court). THE COURT: I will overrule the objection. The record may show the objection. Q. (By MR. MacGILLIVRAY): Mr. Prophet, at that time when you turned those cars loose drifting down Track 13, did you have in mind this rule, being Rule 805 of the Consolidated Code, 1945 Edition, reading as follows: 'Before moving cars or engines in a street or on station or yard tracks, it must be known that they can be moved with safety.' Did you have that in mind? A. In the back of my mind, yes, sir. Q. Pardon? A. Probably in the back of my mind. yes, sir. You can't hold 900 some in the front of your mind. Q. Well, did you consciously have in mind that rule on that night? A. I don't know whether I had it consciously or not. MR. McKEVITT. May it be understood I have a general objection? THE COURT: Yes. the record may show the continuing objection. Q. (By MR. MacGILLIVRAY): Mr. Prophet. did you have in mind that night this section of Rule 805: 'Before moving or coupling to cars that are being

loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone.' MR. McKEVITT: Same objection. Q. (By MR. MacGILLIVRAY): Did you have that rule in mind? MR. McKEVITT: Same objection. THE COURT: All right, overruled. Q. (By MR. MacGILLIVRAY): Did you have that rule in mind consciously that night? A. I didn't know that those cars were being loaded or we would - - Q. You didn't know they weren't? A. That they were being loaded or unloaded. Q. And you didn't know that they were not being loaded or unloaded, did you? A. No. sir." (Tr. 419-422.)

On cross-examination the witness James Crump was interrogated by appellee's counsel as follows:

"Q. Mr. Crump, you spoke about blue lights. You have a blue light rule in the operating rules? A. That's right. Q. And are you familiar with the operating rule book? A. Yes. Q. Are you familiar with Rule 805? A. Not by number. Q. By contents? A. Beg pardon? Q. Are you familiar with it by its contents? A. Yes. THE COURT: A copy may be substituted. Q. (By MR. MacGILLIVRAY): Mr. Crump, were you familiar with that section of Rule 805 of the Consolidated Code reading as follows: 'Before moving cars' - - MR. McKEVITT: Your Honor, for the purpose of the record, the defendant objects to the introduction of that rule or any portion thereof into this case as not being within the issues. It has not been pleaded and it is not contended or asserted that we violated any rule that was enacted for the benefit of Addison Miller employees. THE COURT: All right, the record will show the objection. Overruled. Q. (By MR. MacGILLIVRAY): Mr. Crump, were you on July 17, 1952, at 8:15 p. m., immediately before you turned these 14 cars loose in front of the yard office, familiar with that section of Rule 805 of the Consolidated Code reading as follows: 'Before mov-

ing cars or engines in a street or a station or yard track, it must be known that they can be moved with safety' A. Yes. Q. And were you familiar with this section of Rule 805: 'Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone.' A. Yes. MR. MacGILLIVRAY: Ask, your Honor, the admission of the quoted sections of Rule 805 of the Consolidated Code. A copy of the sections can be substituted for the complete Consolidated Code to be placed in evidence. MR. McKEVITT: Same objection as we previously stated. THE COURT: Yes, the record will show the same objection, and it will be overruled and the exhibit admitted. That is 47, isn't it? THE CLERK: That is 47. Now I have marked Plaintiff's 48, 49 and 50 for identification. (Whereupon, the said sections of Rule 805 were admitted in evidence as plaintiff's Exhibit No. 47)" (Tr. 799-801).

In order to make clear that this rule had no application to the issues as joined by the amended complaint and appellee's statement of contentions, and without waiving its objection to the portion introduced by appellee, the defendant introduced in evidence the entire rule (Tr. 812-813, Ex. 51). It reads as follows:

"805. When it can be avoided, engines must not stand within 100 feet of a public crossing, under bridges or viaducts, or in the vicinity of waiting rooms, telegraph offices, or near cars which are occupied by passengers.

"Before moving cars or engines in a street, or on station or yard tracks, it must be known that they can be moved with safety.

"Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be

moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided. (Italics supplied—portion of rule introduced by appellee over appellant's objection).

"Cars containing livestock must not be switched unnecessarily or cut off and allowed to strike other cars.

"Care and good judgment must be used in switching cars to avoid damage to contents and equipment, and it must be known that necessary couplings are made and that sufficient hand brakes are set.

"When switching at stations or in yards where engines may be working at both ends of the track, movements must be made carefully and an understanding had with other crews involved.

"When switching or placing cars they must not be left standing so close as to not fully clear passing cars on adjacent tracks or cause injury to employees riding on the side of cars. Cars must not be shoved blind or out to foul other tracks unless the movement is properly protected."

It is appellant's position that this rule had no application to the work being performed by Gerald Stintzi at the time he was injured. The rule should be considered in its entirety. It will be noted that the last sentence of the second paragraph of said rule, on which appellee so heavily relied, was entirely omitted. That sentence reads as follows: "When cars are moved they must be returned to their former location unless otherwise provided."

In the instant case there was no movement of cars such as this rule contemplates. The phrase "all per-

sons in or about the cars" certainly was not intended to cover a non-employee of the defendant who was attempting to crawl either under or over the drawbars and who was not performing any work which had anything to do with these cars or the movement thereof.

The "persons" referred to in this rule could only have reference to: (a) Railway employees performing an assigned duty of either repairing the "cars," loading the same or unloading the same; (b) Third persons lawfully on the railway property and engaged in some duty in which the railway company and the third parties' employer had a mutual interest.

Assuming for argument that Stintzi was an invitee, a reasonable interpretation of this rule would not require the railway employees to anticipate that he would be engaged in the kind of work he was doing and more especially the manner in which he was performing it. The application of this rule was tantamount to making the appellant railway company an absolute insurer of Stintzi's safety. Even under the Federal Employer's Liability Act the railway company is only required to exercise reasonable care for the safety of its own employees; it is not an insurer of their safety.

> *Northern Pacific Ry. Co. vs. Mely,*—Fed. (2d)—, (decided by this Court December 13, 1954).

That the trial Court was confused with reference to the application of the portion of Rule 805 referred to

is shown by the record. When the witness Prophet was on the stand the following took place:

> "MR. CASHATT (appellant's counsel): As I see it, your Honor, the way it is in the case now, no matter what a man is doing, if he is crawling between cars, and so on, the rule is not applicable to the situation here. There is no evidence he was unloading or doing anything of that type; the only undisputed evidence is that he was crawling under the couplers."
>
> "THE COURT: Well, here is the position it puts the Court in: This witness says that he is relying on the blue light rule, and it seemed to me proper cross-examination to call to his attention other rules that appeared on their face to be applicable, general language in there as to moving cars and when it doesn't appear that it is safe to do so. * * *"

As a matter of fact, the witness Prophet was not relying on a blue light *rule*; his whole testimony indicates that he was referring to the presence or absence of a blue light which it was the duty of Addison Miller, Stintzi's employer, to place on top of the ice dock and which would serve as a warning to railway employees that they were not to do any switching on that track because icing operations were in progress.

The instruction to the jury covering this rule placed a powerful weapon for argument in the hands of appellee's counsel. By implication it is not *de hors* the record to assert that powerful use was made of it. It can well be said that it was the very heart of the jury's verdict.

C. Specification of Error VI.

This specification of error is directed against the following instruction given by the Court:

> "If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of *negligence in any degree* or act or failure to act, as charged and claimed by the plaintiff, *which contributed proximately in any measure* to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto." (Tr. 886-887.)

We have italicized the language against which we complain. It is our position that this language permitted appellant to be held liable in this case upon a finding of slight negligence, or in other words, imposed upon appellant the duty to use an extraordinary or high degree of care. Furthermore, the language, "which contributed proximately in any measure" authorized a verdict against appellant for negligence which was less than a material cause.

As to the last-mentioned language, the following appears in 38 Am. Jur. 715, Negligence, §63:

> "An injury cannot be attributed to a cause, unless, without it, the injury would not have occurred. Accordingly, the mere concurrence of one's negligence with the proximate and efficient cause of a disaster will not impose liability upon him; it is well settled, however, that negligence, in order to render a person liable, need not be the sole cause of an injury. It is sufficient for such purpose that it was an efficient concurring cause, that is, a cause which was operative at the moment of the injury and acted contemporaneously with another cause to produce the injury, and which was an efficient cause in the sense that except for it, the injury would not have occurred."

Nowhere did the Court define to the jury the language, "which contributed proximately in any measure," and the jury was left to its own resources as to the meaning of the phrase. We again say that the instruction permitted and in fact directed a verdict against appellant upon a finding of slight negligence, which was less than an efficient and material cause of the injury.

In accordance with the usual practice in the District Court for the Eastern District of Washington, the Judge informed counsel in advance of the arguments as to which of their requested instructions he proposed to give. The above instruction was plaintiff's requested instruction No. 2 and counsel were so informed by the Judge in advance of the arguments that this requested instruction was to be given. Appellee's counsel thereafter, in arguing to the jury, stated that it was expected that the Court would instruct

the jury to that effect, and great emphasis was placed upon the words "in any degree," and the words "in any measure" in the argument.

We therefore submit that the error in this respect was most prejudicial and may have had much to do with the resulting verdict against appellant.

D. Specification of Error VII.

Error is here claimed upon the refusal of the District Court to give that portion of appellant's requested instruction No. 3 reading as follows:

> "You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger." (Tr. 35.)

As before stated, objection was duly lodged against failure of the Court to so instruct, upon the ground that this was a part of appellant's theory of the case. The evidence disclosed that there were no more than 3 freight cars standing to the east of the point where Stintzi passed between the couplers which would involve a distance of not more than 120 feet, at which point he could have crossed open track (Tr. 703, 540). Also, the evidence disclosed areas adjacent to the ice dock where the ice could have been dumped without crossing any tracks. The evidence further shows that Stintzi himself chose to go between the cars (Tr. 131, 193).

The above-quoted requested instruction correctly states the law.

38 Am. Jur. 873, Negligence §193.

Scharf vs. Inland Emp. Ry., 92 Wash. 561, 159 Pac. 797.

Clark vs. N. P. Ry., 29 Wash. 139, 69 Pac. 636.

It needs no citation of authority that each party is entitled upon proper request to instructions embodying his theory of the case. Certainly appellant was entitled to this instruction embodying its theory, and we submit that the requested instruction should have been given to adequately guide the jury in reaching a correct determination on the issue of the contributory negligence of Stintzi.

E. Specification of Error VIII.

Appellant requested the District Court to give the following instruction:

> "Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing Track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant." (Tr. 36-37.)

This instruction was requested because the District Court had already indicated that he proposed to submit to the jury the issue of whether Stintzi was an invitee, which necessarily meant that the issues of

negligence and contributory negligence were also going to be submitted.

As heretofore stated, Stintzi and his friend, Allen Maine, testified that in the string of cars between which they were passing there was a salt car being unloaded into the ice dock and they felt that was insurance that the cars would not be moved. Against their testimony, appellant produced numerous railway records to show positively that there was no salt car being unloaded at the time and no car containing salt in the string of cars. Nevertheless, we appreciate that, in view of the testimony of Stintzi and Maine, an issue of fact was created and the jury was entitled to disregard all of such records and find that there was a salt car being unloaded at the time.

This testimony of Stintzi and Maine, however, afforded Stintzi's only escape from contributory negligence as a matter of law. Assuming that there was no salt car being unloaded at the time, it is our position that reasonable minds could not differ on the proposition that Stintzi was grossly negligent in himself choosing to go between these cars. If there was no salt car being unloaded, he had no basis whatsoever for assuming or believing that these cars would not be moved at any time. He made no claim that he had any other assurance from anybody that they would not be moved, nor did he claim any other knowledge or basis for an assumption that they would not be moved, aside from the alleged salt car.

Therefore, it was and is our position that the real issue as to whether or not Stintzi was contributorily

negligent was the truth or falsity of his testimony and the testimony of Maine as to the unloading of the salt car at the time. If, in fact, a salt car was being unloaded, a jury could still find him contributorily negligent; but if there was no salt car being unloaded then we say he was necessarily contributorily negligent as a matter of law.

It is our position that this requested instruction was necessary in order to insure that the jury would place the issue of the salt car in its proper perspective. Without this instruction, the jury, under the other instructions, could have concluded that there was no salt car but that Stintzi, nonetheless, was not contributorily negligent. Without this instruction, the jury had no guide whatsoever to the proper consideration of this all-important factual issue.

This requested instruction was somewhat akin to a special interrogatory on this vital issue. The failure to give it prevented appellant from having a fair trial, particularly because appellant's records so conclusively show that there was no such a salt car.

Again it needs no citation of authority that each party is entitled to instructions on his theory of the case when properly requested. This was a requested instruction embodying appellant's theory of the case and the very heart of the defense. We earnstly submit that it was error very prejudicial to appellant to fail to give it, and that, in any event, a new trial is fully warranted therefor.

F. Specification of Error IX.

It is contended by appellant that the damages found by the jury are excessive from any viewpoint; $148,500 was the amount of the verdict on which judgment was entered. Appellee established special damages in the sum of $12,505; it is reasonable to assume that the full amount of the same was included in the verdict; if this be true, then general damages in the sum of $135,995.00 were awarded.

This boy was injured during a school vacation. Primarily, his permanent impairment consisted of the loss of his right leg at the hip. No earning capacity previous to his injury was established. We believe that the amount of this award was to a large extent influenced by the Court's instruction that the jury

> "* * * should consider further whether or not his injuries are permanent in character and whether or not they will with reasonable certainty prevent him in the future from engaging in a gainful occupation * * *."

In addition thereto the admission in evidence of Exhibits 26 to 33, over appellant's objection, undoubtedly influenced the jury in arriving at the amount of the verdict. These pictures of Stintzi's body were exhibited to the jury in an open, darkened courtroom by means of having them projected against a beaded screen 40 inches by 40 inches, by the use of a projector which enlarged said pictures twenty to twenty-one times their normal size. A detailed explanation of each exhibit as it was thrown on the screen was given by the witness, Dr. Valentine. The full nature and extent of the boy's injuries had been gone into at

great length by the doctor prior to the showing of these pictures. His testimony in that regard, and apart from what he said concerning the pictures, covers approximately 17 pages of the record (Tr. 443-460). These pictures could not have failed to arouse the passion, prejudice and sympathy of the jury.

Admitting the seriousness of the injuries sustained, they were not of such a character as to permit a jury to determine under the evidence that this boy could not in the future engage in a gainful occupation. The evidence disclosed that he planned to study law at Gonzaga University in Spokane, Washington (Tr. 200). He is bright and intelligent and with the proper education he can develop high earning capacity in intellectual pursuits.

The amount of $135,995.00 can be put out at interest at as low a rate as 2½% and would yield approximately $4,000.00 per year; at 3%, $4,079.00 per year; at 6%, the legal rate, $8,159.00 per year. He could thus live off the interest alone and at his death would leave the principal unimpaired, an estate of $135,995.00. Such a result is not in accord with the legal principles governing the awarding of compensatory damages for personal injury. The size of the verdict is such as to constitute a penalty or punitive damages. There is no way to account for its size except that it was arrived at by passion, sympathy or prejudice and was not the result of cool, dispassionate consideration.

CONCLUSION

On the basis that appellee Gerald Stintzi was not an invitee on the premises of Northern Pacific Rail-

way Company at the place of his injury, particularly in view of the extremely hazardous and dangerous use that he was making of the premises at the time, we most earnestly contend that this judgment should be reversed, and the action dismissed and Stintzi left to his remedy through his employment.

We further contend, upon the material uncontroverted facts as to the blue light custom, the failure of Addison Miller Company to turn on the blue lights, and Stintzi's own decision to crawl beneath the couplings of these standing freight cars with no reasonable basis for assuming that it was safe to do so, that appellant was not guilty of any negligence which was a proximate cause of the injury and that Stintzi was himself guilty of contributory negligence as a matter of law, and that for these further reasons, the judgment should be reversed and the action dismissed.

We further contend that in any event the judgment should be reversed and a new trial directed for the errors assigned.

Lastly, we contend that, because of the excessiveness of the verdict, a new trial should be ordered, or at least a reduction of the verdict alternatively ordered.

Respectfully submitted,

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TO
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TRACK 14

TRACK 13

ICING PLATFORM (DOCK)

TRACK 12

TRACK 11

TRACK 10

TRACK 9

TRACK 8

TRACK 7

TRACK 6

TRACK 5

TRACK 4

TRACK 3

TRACK 2

TRACK 1

TUNNEL

ICE PLANT